Supreme Court, U.S.
FILED
APR 10 2000
CLERK

(2)

No. 99-1170

# In the Supreme Court of the United States

WALLACE C. YOST, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
JAMES K. ROBINSON
*Assistant Attorney General*
JUAN C. ZARATE
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

15pp

## QUESTION PRESENTED

Whether the district court in this case acted within its authority under Federal Rule of Criminal Procedure 35(c)—which provides that a district court may correct a sentence "that was imposed as a result of arithmetical, technical, or other clear error" within seven days after the imposition of sentence—when, upon recognizing that it had sentenced petitioner under the wrong Sentencing Guideline, it vacated the sentence, conducted a new sentencing hearing, and revisited a prior ruling concerning the conduct relevant to petitioner's offenses.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 7 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *United States* v. *Bentley*, 850 F.2d 327 (7th Cir.), cert. denied, 488 U.S. 970 (1988) | 8 |
| *United States* v. *DeMartino*, 112 F.3d 75 (2d Cir. 1997) | 8 |
| *United States* v. *Fraley*, 988 F.2d 4 (4th Cir. 1993) | 9 |
| *United States* v. *Layman*, 116 F.3d 105 (4th Cir. 1997), cert. denied, 522 U.S. 1107 (1998) | 8 |
| *United States* v. *Morrison*, 204 F.3d 1091 (11th Cir. 2000) | 6 |
| *United States* v. *Mueller*, 74 F.3d 1152 (11th Cir. 1996) | 4, 5 |
| *United States* v. *Portin*, 20 F.3d 1028 (9th Cir. 1994) | 9 |


Statutes and rules:


| | Page |
|---|---|
| 18 U.S.C. 2 | 2, 3 |
| 18 U.S.C. 371 | 2, 3 |
| 18 U.S.C. 1341 | 2, 3 |
| 18 U.S.C. 1344 | 3, 4 |
| Fed. R. Crim. P.: | |
| Rule 11(e)(1)(C) | 9 |
| Rule 35 | 10 |
| Rule 35 advisory committee note (1991) | 8 |
| Rule 35(c) | 4, 5, 6, 7, 8, 9, 10 |

Rules—Continued: Page

United States Sentencing Guidelines:
§ 2F1.1 ..... 4, 5
§ 2S1.1 ..... 4
§ 3D1.2(d) ..... 3
§ 3D1.3(b) ..... 3
§ 5K1.1 ..... 4

# In the Supreme Court of the United States

No. 99-1170

WALLACE C. YOST, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 185 F.3d 1178.

### JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 14, 1999 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of conspiracy to commit

mail fraud, wire fraud, and bankruptcy fraud, in violation of 18 U.S.C. 371, and one count of mail fraud, in violation of 18 U.S.C. 1341 and 2. The district court initially sentenced petitioner to 14 months' imprisonment, to be followed by three years' supervised release, and ordered petitioner to pay a $10,000 fine and $50,000 in restitution. The district court subsequently set aside that sentence and imposed a new sentence, in which petitioner was ordered to serve 18 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay restitution in the amount of $1,050,000 (but no fine). The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner was a developer in the Pensacola, Florida, area who owned properties both individually and in corporate names. From 1989 to 1991, petitioner was unable to meet financial obligations as they became due, and creditors began the process of liquidating the security on petitioner's loans. Facing foreclosure actions, petitioner declared bankruptcy and illegally transferred properties in an attempt to protect them from creditors. Eventually, AmSouth Bank obtained three judgments against petitioner totaling $7,300,000, and Citizens and Builders (C&B) Bank obtained two judgments totaling more than $3,525,000. Gov't C.A. Br. 26-34; Presentence Report (PSR) 4-6.

In June 1990, attorneys for C&B Bank took depositions of petitioner and his wife to identify personal assets that might satisfy an outstanding judgment. During his deposition, petitioner did not tell the truth about the existence and location of his personal assets, which frustrated the bank's efforts to collect on the judgment. Gov't C.A. Br. 29-30.

2. In May 1997, a grand jury returned an indictment against petitioner charging him with offenses arising

out of his attempts to conceal assets from creditors in his bankruptcy proceedings. The indictment charged petitioner with one count of conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud, in violation of 18 U.S.C. 371 (Count 1); two counts of bank fraud, in violation of 18 U.S.C. 1344 and 2 (Counts 2 and 3); and one count of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Count IV). Two co-defendants, David Fleming and Steven Oppenheim, were also charged in Counts 1-3 of the indictment. See C.A. Rec. Ex. 1-23.

Petitioner entered into a plea and cooperation agreement with the government. He eventually pleaded guilty to conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud (part of Count 1) and to mail fraud (Count 4). His guilty plea to the conspiracy count, however, did not include a guilty plea to conspiracy to commit money laundering or bank fraud. Pet. App. 2a-3a.

On March 24, 1999, the district court held a sentencing hearing. At that sentencing hearing, the district court grouped petitioner's offenses in Counts 1 and 4, pursuant to Sentencing Guidelines § 3D1.2(d), to determine petitioner's offense level. In so doing, however, the district court erroneously included under the conspiracy count the offenses of conspiracy to commit money laundering and conspiracy to commit bank fraud, to which petitioner had not pleaded guilty. Pet. App. 3a.

Under Guidelines § 3D1.3(b), which governs the offense level applicable to groups of closely related counts, the district court was required to impose a sentence based on the greatest offense level for any of petitioner's offenses. The applicable Sentencing Guideline for fraud offenses, including conspiracy to commit

bank fraud, mail fraud, wire fraud, and bankruptcy fraud, is Guidelines § 2F1.1. The applicable Guideline for conspiracy to commit money laundering is Guidelines § 2S1.1. In determining petitioner's offense level under the fraud Guideline, Section 2F1.1, the district court concluded, based on *United States* v. *Mueller*, 74 F.3d 1152, 1159-1160 (11th Cir. 1996), that petitioner had not committed the offense of bank fraud in giving incomplete testimony at his deposition, and therefore declined to consider that conduct as part of petitioner's relevant conduct.[1] The court then determined that the money laundering Guideline, Section 2S1.1, would yield a higher offense level than the fraud Guideline. Accordingly, it applied Section 2S1.1, which yielded an adjusted offense level of 17 and a sentencing range of 24-30 months' imprisonment. The court also granted the government's motion for a downward departure pursuant to Guidelines § 5K1.1 based on petitioner's cooperation. The court then sentenced petitioner to 14 months' imprisonment and ordered him to pay a $10,000 fine and $50,000 in restitution.

3. When the district court sentenced co-defendant Fleming two days later, on March 26, 1999, it realized that it had erred in petitioner's sentencing by applying the money laundering Guideline, Section 2S1.1, since petitioner had not pleaded guilty to conspiracy to engage in money laundering. The next day, the district court vacated petitioner's sentence pursuant to Federal Rule of Criminal Procedure 35(c) and conducted a new sentencing hearing. Pet. App. 15a. Rule 35(c) provides that a district court, "within 7 days after the imposition

---

[1] *Mueller* held that a defendant's filing of a misleading answer and affidavit in a civil suit did not constitute a violation of the criminal bank fraud statute, 18 U.S.C. 1344.

of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, *or other clear error*." Fed. R. Crim. P. 35(c) (emphasis added).

At the new sentencing hearing, the district court observed that it had improperly applied the money laundering Guideline to petitioner because petitioner had not pleaded guilty to conspiracy to engage in money laundering. The court also ruled that the money laundering Guideline would not be applicable to petitioner in any event because the statute of limitations would have barred a conviction for money laundering. Pet. App. 15a. The court therefore resentenced petitioner under the fraud Guideline, Section 2F1.1.

In correcting its error and imposing a new sentence, the district court also reexamined its earlier determination that petitioner's conduct did not constitute bank fraud under the Eleventh Circuit's decision in *Mueller*, *supra*. The court concluded that petitioner's conduct did in fact constitute conspiracy to commit bank fraud and therefore should be considered as part of the relevant conduct in sentencing petitioner under the fraud Guideline. The court then recalculated petitioner's offense level under the fraud Guideline. That recalculation resulted in an adjusted offense level of 19, for a Guidelines sentencing range of 30-37 months' imprisonment. After again granting the government's motion for downward departure, the court sentenced petitioner to 18 months' imprisonment, and ordered petitioner to pay restitution in the amount of $1,050,000. Pet. App. 4a & n.3.

4. Petitioner appealed, arguing that, when the district court acted under Rule 35(c) to correct its error in sentencing him based on the money laundering Guideline, it had no authority also to reexamine its earlier decision that petitioner had not engaged in conspiracy

to commit bank fraud and to recalculate his offense level under the fraud Guideline based on that reexamination.[2] The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that the district court had authority under Rule 35(c) to resentence petitioner, because it had made a "clear error" in sentencing petitioner under the money laundering Guideline. See Pet. App. 6a-7a. Given that the district court had that authority to resentence petitioner, the court held that it also had the authority to revisit prior rulings that were

---

[2] Rule 35(c) provides that a court may correct a sentence based on clear error "within 7 days after the imposition of sentence." It does not, however, expressly define "the imposition of sentence" or address whether a district court may reexamine determinations affecting sentencing before "the imposition of sentence." In this case, the district court conducted the second sentencing hearing within seven days of its initial sentencing hearing, but before it had entered any written imposition of sentence or entered judgment. Because the second sentencing hearing occurred after the first oral sentence was pronounced but before the judgment of conviction was entered, the question arose whether the district court had initially imposed a sentence on petitioner. If no sentence had been imposed before the second sentencing hearing, then the district court's authority to reexamine its determinations might not be constrained by Rule 35(c). The court of appeals observed that other circuits are in disagreement as to whether the oral pronouncement of sentence after a hearing constitutes "the imposition of sentence" under Rule 35(c). See Pet. App. 5a n.4. It found no need to resolve that issue in this case, however, because it determined that the district court did have authority to reexamine its earlier determination as to whether petitioner's conduct constituted conspiracy to commit bank fraud when it corrected the sentence based on its error in applying the money laundering Guideline. *Id.* at 6a. The Eleventh Circuit has since ruled that the "seven-day period set out in Rule 35(c) begins to run when the sentence in a case is orally imposed." *United States* v. *Morrison*, 204 F.3d 1091, 1094 (11th Cir. 2000).

reflected in its original sentence. The court noted that it had taken a "holistic approach" to criminal sentences reviewed on appeal, under which a sentence that is vacated for error and remanded to the lower court "becomes void in its entirety and the district court is free to revisit any rulings it made at the initial sentencing." *Id.* at 7a-8a. The court saw "no reason why the same should not be true when the district court resentences under Rule 35(c)." *Id.* at 8a. Accordingly, it held that "it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not." *Ibid.*

## ARGUMENT

Petitioner contends (Pet. 6-13) that when the district court acted under Federal Rule of Criminal Procedure 35(c) to correct his sentence, the court lacked authority to reexamine its earlier determination that petitioner had not engaged in conspiracy to commit bank fraud. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Rule 35(c) provides that the district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Rule 35(c) therefore limits the reasons for which a district court may move in the first instance to correct a sentence; the court may do so only if it discovers some "arithmetical, technical, or other clear error" in the sentence. Rule 35(c) does not, however, limit the district court's authority to correct a defendant's sentence once it discovers the existence of an arithmetical, technical, or

clear error that influenced the sentence. Thus, although under Rule 35(c) the district court may not correct a sentence in the absence of an arithmetical, technical, or clear error, once it discovers the existence of such an error, it may then correct any other error in the sentence, even if that other mistake by itself would not have warranted reopening the sentence.[3] As the Seventh Circuit has explained: "[W]henever the district court must revise one aspect of the sentencing scheme, it is permitted by Rule 35 to revise the rest. The district court may act without waiting for instructions or permission." *United States* v. *Bentley*, 850 F.2d 327, 329, cert. denied, 488 U.S. 970 (1988).

In this case, the district court initially erred in applying the money laundering Guideline rather than the fraud Guideline to determine petitioner's sentence. Once the district court recognized its error, it moved to correct petitioner's sentence. At that point it was free to correct other errors that had influenced its initial determination of petitioner's sentence.

Petitioner correctly observes (Pet. 7-8) that Rule 35(c) does not provide the district court with the authority to correct a sentence merely because the court changes its mind about the appropriateness of a sentence. See Fed. R. Crim. P. 35 advisory committee note (1991); *United States* v. *Layman*, 116 F.3d 105, 107-109 (4th Cir. 1997), cert. denied, 522 U.S. 1107 (1998); *United States* v. *DeMartino*, 112 F.3d 75, 80-81 (2d Cir. 1997). That is not what occurred in this case,

---

[3] In this Court, petitioner does not dispute that the district court acted properly to resentence him under the fraud Guideline, because application of the money laundering Guideline was "arithmetical, technical, or other clear error" within the meaning of Rule 35(c).

however; here, the district court was empowered to correct the sentence because it resulted from a clear error, and in doing so it was not precluded from also correcting other errors influencing the sentence. This is not a case, therefore, where "the district court unequivocally states a sentence and then imposes it, and the sentence is not the product of error." *United States* v. *Fraley*, 988 F.2d 4, 7 (4th Cir. 1993).

2. The decision below does not conflict with the decision of any other court of appeals. Petitioner suggests that the decision below conflicts with the *Layman*, *DeMartino*, and *Fraley* decisions, but as discussed above, those cases involved situations where the initial sentence imposed by the district court contained no error of any kind, much less clear error, and therefore the resentencing simply reflected a change of heart on the part of the district court about the appropriate sentence.

In *United States* v. *Portin*, 20 F.3d 1028 (9th Cir. 1994), the court held that, when a district court acts pursuant to Rule 35(c) to correct the term of imprisonment imposed on a defendant, it may not use that authority also to alter a separate part of the sentence (in that case, a fine). In *Portin*, the district court rejected plea agreements the parties had negotiated under Federal Rule of Criminal Procedure 11(e)(1)(C) and did not allow the defendants to withdraw their guilty pleas, as required under that Rule; instead, the district court sentenced both defendants to more prison time than the amount to which they had agreed in the plea agreements and also fined both defendants. The district court later acknowledged its error in failing to allow the defendants to withdraw their guilty pleas and corrected the defendants' sentence of imprisonment pursuant to Rule 35(c), but it also increased the fines it

previously had imposed. The Ninth Circuit ruled that the district court exceeded its authority under Rule 35(c) by increasing the fines because there was no error as to the fines and all the issues with respect to fines had been resolved at the initial sentencing hearing. *Ibid.* The court followed its prior decisions holding that when "a sentence [is] composed of legal and illegal 'portions,' * * * [and] the illegal part [can] be cleanly 'lopped off,'" *id.* at 1030, a district court may act under Rule 35 only to correct the illegal part of the sentence.

This case is distinguishable from *Portin* because the district court's error at the initial sentencing did not yield an illegal part of the sentence that could be cleanly "lopped off" from the rest of the sentence. Rather, the district court's error was its use of an improper Sentencing Guideline to determine petitioner's sentence. Because the district court used the wrong Guideline, all aspects of petitioner's sentence required correction through use of a different Guideline. When the district court then applied the proper Guideline to determine petitioner's sentence, it was entitled to make a correct, not an erroneous, sentencing determination under that Guideline. That determination necessarily involved a calculation of the loss and amount of applicable fines and restitution to be paid.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*
JAMES K. ROBINSON
*Assistant Attorney General*
JUAN C. ZARATE
*Attorney*

APRIL 2000